

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BENJI D. REED,

Plaintiff,

v.

Civil Action No.

9:11-CV-0250 (TJM/DEP)

JOHN DOE, 1 and
SUPERINTENDENT, Eastern
Correctional Facility,

Defendants.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF:

BENJI D. REED, *Pro Se*
04-B-3302
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

FOR DEFENDANTS:

HON. ERIC T. SCHNEIDERMAN
New York State Attorney General
The Capitol
Albany, NY 12224

JAMES SEAMAN, ESQ.
Assistant Attorney General

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

REPORT AND RECOMMENDATION

Pro se plaintiff Benji D. Reed, a New York State prison inmate, commenced this action in March 2011 alleging, *inter alia*, that some of the defendants employed at the Eastern Correctional Facility violated his civil rights and committed negligence during the course of his incarceration in that facility. The scope of this action has been narrowed as a result motion practice, and the only remaining cause of action is an Eighth Amendment conditions of confinement claim asserted against defendant John Doe 1, who has not been identified by plaintiff. To assist plaintiff in identifying defendant John Doe 1, the court substituted the superintendent of Eastern for purposes of service and discovery only. Following the close of discovery, the superintendent filed the currently pending motion seeking the entry of summary judgment in his favor in light of the absence of any record evidence that he was personally involved in the allegations giving rise to this action. For the reasons set forth below, I recommend that the superintendent's motion be granted.

I. BACKGROUND¹

Plaintiff is a prison inmate currently in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"). See generally [Dkt. No. 30](#). Although he is now incarcerated elsewhere, at the times relevant to his claims Reed was confined in the Eastern Correctional Facility ("Eastern"), located in Napanock, New York. *Id.*; [Dkt. No. 55](#).

Plaintiff commenced this action on March 8, 2011, asserting the deprivation of his constitutional and federal statutory rights, as well as common law claims, against two unnamed defendants, designated as John Doe 1 and John Doe 2, and defendant M. Soto, a Corrections Counselor at Eastern.² See generally [Dkt. No. 30](#). In his complaint, as amended, plaintiff alleges that on September 14, 2010, he became ill after consuming spoiled corn and rice at the Eastern mess hall. *Id.* at 3. As a

¹ In light of the procedural posture of the case, the following recitation is derived from the record now before the court, with all inferences drawn and ambiguities resolved in plaintiff's favor. *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003). In light of the severance and transfer of plaintiff's claims arising out of his confinement in the Southport Correctional Facility to the Western District of New York, and dismissal of plaintiff's retaliation claim against defendants M. Soto and John Doe 2, as will be discussed below, I have included only the facts relevant to plaintiff's remaining claim asserted against defendant John Doe 1.

² Plaintiff's complaint also named seven corrections employees assigned to the Southport Correctional Facility ("Southport") as defendants. All claims stemming from events occurring at Southport were severed from those arising out of Eastern, however, and were transferred to the Western District of New York by order issued by Senior District Judge Thomas J. McAvoy on August 2, 2011. [Dkt. No. 4](#).

result, plaintiff suffered abdominal pain and extreme bouts of diarrhea. *Id.* Plaintiff alleges that defendant John Doe 1 was advised that the corn and rice emitted a foul odor and could be contaminated, but failed to heed the warning and ordered that it be served to the general prison population. *Id.* at 4.

Plaintiff was initially treated on the following day at the Eastern medical clinic, along with several other infected inmates, and was given "dymo tablets" to address the condition. [Dkt. No. 30 at 3](#). He was subsequently directed to return to the clinic later that day, however, and instructed to discontinue the use of the dymo tablets and told that he would instead be placed on a water diet and confined to his cell for one day to flush out any infection. *Id.* at 4.

II. PROCEDURAL HISTORY

Plaintiff commenced this action on March 8, 2011. [Dkt. No. 1](#). As defendants, plaintiff's complaint named two "Doe" defendants, M. Soto, and seven corrections employees assigned to Southport. *Id.* at 2. The complaint asserted claims under the Eighth Amendment to the United States Constitution; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*; section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794; and New York State common law. *See generally id.* Based upon an initial review of plaintiff's complaint and an

accompanying *in forma pauperis* application, pursuant to 28 U.S.C. § 1915(e)(2), Senior District Judge Thomas J. McAvoy directed all claims arising from the events occurring at Southport severed and transferred to the Western District of New York. [Dkt. No. 4](#).

In response to plaintiff's complaint, defendant Soto, the sole remaining named defendant in the action following Judge McAvoy's decision, moved for dismissal of plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. [Dkt. No. 11](#). Plaintiff followed with a motion, filed on December 7, 2011, seeking leave to amend his complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. [Dkt. No. 14](#). Plaintiff's motion was intended, in part, to clarify and expand upon the allegations set forth in his original complaint related to the events at Eastern and eliminate claims and references to the defendants affected by the transfer to the Western District of New York.³ *Id.* In a report issued on July 26, 2012, I recommended dismissal of plaintiff's claims against defendant Soto with leave to amend regarding plaintiff's cause of action for retaliation. [Dkt. No. 22](#). Judge McAvoy adopted that recommendation on September 30, 2012, and plaintiff was granted leave to replead within thirty days. [Dkt. No. 28](#).

³ In his motion, plaintiff also sought the appointment of *pro bono* counsel to represent him in the action. [Dkt. No. 15](#). That motion was denied without prejudice. [Dkt. No. 17](#).

Plaintiff availed himself of the opportunity to amend, and submitted an amended complaint on October 12, 2012. [Dkt. No. 30](#). Upon review of that amended complaint, I issued a report dated November 9, 2012, in which I recommended that (1) the amended complaint be rejected insofar as it asserts a retaliation claim against defendant Soto and that the claim be dismissed with prejudice; (2) the amended complaint be rejected with respect to plaintiff's state common law claims against defendant John Doe 2; (3) plaintiff's amended complaint be accepted as it relates to the constitutional claims asserted against defendant John Doe 1; (4) the superintendent at Eastern be added as a defendant for the purposes of service and discovery to assist plaintiff in identifying defendant John Doe 1; and (5) Judge McAvoy direct plaintiff to take reasonable steps to ascertain the identity of defendant John Doe 1 and seek permission to add that individual by name as a defendant in the action. [Dkt. No. 33 at 18-21](#). On September 27, 2013, Judge McAvoy adopted these recommendations. [Dkt. No. 39](#).

Following the joinder of issue, I issued a standard Rule 16 scheduling order, which, *inter alia*, required that both parties provide mandatory disclosures and established April 4, 2014 as a deadline for completion of all discovery in the action. [Dkt. No. 49](#).

Following the close of discovery, the Eastern superintendent filed the pending motion seeking the entry of summary judgment in his favor. [Dkt. No. 53](#). The superintendent contends that dismissal is appropriate in light of the fact that he is not implicated in plaintiff's claims and plaintiff has failed to identify and join the individual identified in the amended complaint as defendant John Doe 1. Plaintiff has not responded to defendant's motion, which is now ripe for determination, and has been referred to me for the issuance of a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72.3(c). See Fed. R. Civ. P. 72(b).

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment motions are governed by Rule 56 of the Federal Rules of Civil Procedure. Under that provision, the entry of summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 82-83 (2d Cir. 2004). A fact is "material" for purposes of this inquiry, if it "might affect the outcome of the suit under the governing law."

Anderson, 477 U.S. at 248; see also *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005). A material fact is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

A party moving for summary judgment bears an initial burden of demonstrating that there is no genuine dispute of material fact to be decided with respect to any essential element of the claim in issue, and the failure to meet this burden warrants denial of the motion. *Anderson*, 477 U.S. at 250 n.4; *Sec. Ins. Co.*, 391 F.3d at 83. In the event this initial burden is met, the opposing party must show, through affidavits or otherwise, that there is a material dispute of fact for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 250.

When deciding a summary judgment motion, a court must resolve any ambiguities, and draw all inferences, in a light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Jeffreys*, 426 F.3d at 553; *Wright v. Coughlin*, 132 F.3d 133, 137-38 (2d Cir. 1998). The entry of summary judgment is justified only in the event of a finding that no reasonable trier of fact could rule in favor of the non-moving party. *Bldg. Trades Employers' Educ. Ass'n v. McGowan*, 311 F.3d 501, 507-08 (2d Cir. 2002); see also *Anderson*, 477 U.S. at 250 (finding summary

judgment appropriate only when "there can be but one reasonable conclusion as to the verdict").

B. Plaintiff's Failure to Respond to the Superintendent's Motion

Pursuant to local rule 7.1(b)(3), by failing to oppose the Eastern superintendent's motion, plaintiff has effectively consented to the granting of the relief sought. That rule provides as follows:

Where a properly filed motion is unopposed and the Court determines that the moving party has met its burden to demonstrate entitlement to the relief requested therein, the non-moving party's failure to file or serve any papers as this Rule requires shall be deemed as consent to the granting or denial of the motion, as the case may be, unless good cause is shown.

N.D.N.Y. L.R. 7.1(b)(3); *see also Jackson v. Fed. Express*, 766 F.3d 189, 194 (2d Cir. 2014) (holding that the district courts may enter summary judgment in favor of the moving party where the non-moving party fails to respond in opposition, but not without first "ensur[ing] that each statement of material fact is support by record evidence sufficient to satisfy the movant's burden of production" and "determin[ing] whether the legal theory of the motion is sound").

In this case, plaintiff has not responded to the pending motion, which was properly filed by the superintendent. Through his motion, the superintendent has satisfied his burden of demonstrating entitlement to

the relief requested. With respect to the question of the superintendent's burden, I note that his "burden of persuasion is lightened such that, in order to succeed, [their] motion need only be 'facially meritorious.'" See *Rodriguez v. Goord*, No. 04-CV-0358, 2007 WL 4246443, at *1 (Scullin, J., *adopting report and recommendation by* Lowe, M.J.) (finding that whether a movant has met its burden to demonstrate entitlement to a dismissal under local rule 7.1(b)(3) "is a more limited endeavor than a review of a contested motion to dismiss" (citing cases)).⁴ Because the superintendent has accurately cited both proper legal authority and evidence in the record supporting the grounds upon which his motion is based, and plaintiff has failed to respond in opposition, I find the motion is facially meritorious. *Jackson*, 766 F.3d at 194. Accordingly, I recommend that the court grant the superintendent's motion on this basis.⁵

C. Eastern Superintendent

The superintendent at Eastern, the sole remaining named defendant in the action, has moved for the entry of summary judgment dismissing plaintiff's claims against him based upon lack of personal involvement.

[Dkt. No. 53-14 at 5-7](#). "Personal involvement of defendants in alleged

⁴ Copies of all unreported decisions cited in this document have been appended for the convenience of the *pro se* plaintiff.

⁵ For the sake of completeness, I have addressed the merits of the superintendent's motion for summary judgment as well.

constitutional deprivations is a prerequisite to an award of damages under [section] 1983." *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (citing *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991); *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977)). As the Supreme Court has noted, a defendant may only be held accountable for his actions under section 1983. See *Iqbal*, 556 U.S. at 683 ("[P]etitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic."). To prevail on a section 1983 cause of action against an individual, a plaintiff must show "a tangible connection between the acts of a defendant and the injuries suffered." *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986). "To be sufficient before the law, a complaint must state precisely who did what and how such behavior is actionable under law." *Hendrickson v. U.S. Attorney Gen.*, No. 91-CV-8135, 1994 WL 23069, at *3 (S.D.N.Y. Jan. 24, 1994).

When the superintendent was added as a defendant by the court, it was done for the express purpose of permitting plaintiff to engage in discovery in an attempt to ascertain the identity of defendant John Doe 1.

In my report dated November 9, 2012, I stated the following:

I recommend that the clerk of the court be directed to add the superintendent of Eastern as a defendant for service and discovery purposes only. By doing so, I do not suggest in any way that the superintendent of Eastern was personally involved

in the events allegedly giving rise to the Eighth Amendment claim asserted against defendant John Doe #1.

[Dkt. No. 33 at 16](#). Since the issuance of that report and recommendation, plaintiff has not identified defendant John Doe 1, and there is no record evidence suggesting that the superintendent was personally involved in the decision to serve allegedly spoiled food to the inmates at Eastern.⁶

In light of the fact that plaintiff has failed to adduce any evidence suggesting that the superintendent was personally involved in the alleged constitutional violation, and his presence in the lawsuit for discovery purposes is no longer needed, I recommend that plaintiff's claims against him be dismissed.

⁶ As a supervisory employee, the superintendent at Eastern cannot be held liable for damages under section 1983 solely because he occupies that position of authority, or on the basis of *respondeat superior*. *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir. 2003). To establish responsibility on the part of a supervisory official for a civil rights violation, a plaintiff must demonstrate that the individual (1) directly participated in the challenged conduct; (2) after learning of the violation through a report or appeal, failed to remedy the wrong; (3) created or allowed to continue a policy or custom under which unconstitutional practices occurred; (4) was grossly negligent in managing the subordinates who caused the unlawful event; or (5) failed to act on information indicating that unconstitutional acts were occurring. *Iqbal v. Hasty*, 490 F.3d 143, 152-53 (2d Cir. 2007), *rev'd on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 554 (2009); *see also Richardson*, 347 F.3d at 435; *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995); *Wright*, 21 F.3d at 501. The record evidence, including plaintiff's amended complaint, does not suggest that any of these grounds are applicable in this instance.

D. John Doe 1

In his motion, the Eastern superintendent also urges the court to dismiss plaintiff's claims against defendant John Doe No. 1. [Dkt. No. 53-14 at 7](#).

In the court's order issued on September 27, 2013, plaintiff was directed to take reasonable steps to ascertain the identity of defendant John Doe 1. [Dkt. No. 39 at 6](#). In that decision, Judge McAvoy pointedly advised that "[p]laintiff's failure to ascertain the identity of Defendant John Doe #1 will result in the dismissal of this action[.]" *Id.* Because plaintiff failed to heed that warning and take timely measures reasonably calculated to ascertain the identity of John Doe #1, I recommend that his claims against that defendant be dismissed without prejudice.⁷ See, e.g., *Pravada v. City of Albany*, 178 F.R.D. 25, 26 (N.D.N.Y. 1998) (Scullin, J.) (dismissing the unidentified "John Doe" and "Jane Roe" defendants after

⁷ On or about April 29, 2014, plaintiff mailed to Assistant Attorney General James J. Seaman, Esq., a request for the production of documents. [Dkt. No. 53-11](#). The request bears the correct caption but an incorrect civil action number (No. 10-CV-1446) (LEK/RFT)) and was not received by Attorney Seaman until May 22, 2014. *Id.*; [Dkt. No. 53-1 at 3](#). Plaintiff's demands, however, relate to the allegations in his amended complaint, confirming that they were served in connection with this matter. [Dkt. No. 53-11 at 1](#). In response, the superintendent properly objected to the discovery demands as untimely in light of the fact that (1) the deadline for completion of all discovery was April 4, 2014, and (2) plaintiff was alerted to his obligation to serve written discovery demands sufficiently in advance of the discovery deadline to ensure that the latest date on which responses would be due would fall on or before the discovery deadline. See [Dkt. No. 49 at 4](#); [Dkt. No. 53-12](#).

the plaintiff had been provided "over two years to identify and serve these individuals, including the full discovery period").

IV. SUMMARY AND RECOMMENDATION

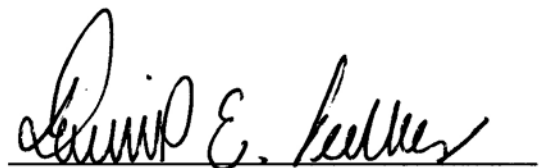
The sole remaining claim in this action is asserted against an unidentified corrections employee based on plaintiff's allegation that he served spoiled food to the general inmate population at Eastern. In deference to his *pro se* status, the court directed that the superintendent at Eastern be named as a defendant so that plaintiff could be afforded a reasonable opportunity to engage in discovery calculated to lead to the identity of defendant John Doe 1. Despite this and the court's warnings that the failure to identify defendant John Doe 1 would result in dismissal of plaintiff's claims against him, plaintiff has not yet done so. Accordingly, I recommend that all of the remaining claims in this action, which was commenced nearly four years ago, be dismissed with regard to the superintendent, who was not personally involved in the constitutional violations alleged, and as against defendant John Doe 1, who remains unidentified. Accordingly, it is hereby respectfully

RECOMMENDED that the Eastern superintendent's motion for summary judgment ([Dkt. No. 53](#)) be GRANTED; and it is further

RECOMMENDED that plaintiff's claims against defendant superintendent be DISMISSED with prejudice and his claims against defendant John Doe 1 be DISMISSED without prejudice.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections must be filed with the clerk of the court within FOURTEEN days of service of this report. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72; *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993).

It is hereby ORDERED that the clerk of the court serve a copy of this report and recommendation upon the parties in accordance with this court's local rules.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: January 30, 2015
Syracuse, NY

Not Reported in F.Supp.2d, 2007 WL 4246443 (N.D.N.Y.)

(Cite as: 2007 WL 4246443 (N.D.N.Y.))

C

Only the Westlaw citation is currently available.

United States District Court,

N.D. New York.

Jose RODRIGUEZ, Plaintiff,

v.

Glen S. GOORD, et al, Defendants.

No. 9:04-CV-0358 (FJS/GHL).

Nov. 27, 2007.

Jose Rodriguez, Willard, NY, pro se.

Andrew M. Cuomo, Attorney General of the State of New York, David L. Cochran, Esq., Assistant Attorney General, of Counsel, Albany, NY, for Defendants.

DECISION AND ORDER

FREDERICK J. SCULLIN, Senior District Judge.

*1 The above-captioned matter having been presented to me by the Report-Recommendation of Magistrate Judge George H. Lowe filed November 6, 2007, and the Court having reviewed the Report-Recommendation and the entire file in this matter, and no objections to said Report-Recommendation having been filed, the Court hereby

ORDERS, that Magistrate Judge Lowe's November 6, 2007 Report-Recommendation is **ACCEPTED** in its entirety for the reasons stated therein; and the Court further

ORDERS, that Defendants' motion, pursuant to Local Rule 41.2(b), to dismiss for Plaintiff's failure to provide notice to the Court of a change of address, is **GRANTED**; and the Court further

ORDERS, that the Clerk of the Court enter judgment in favor of the Defendants and close this case.

IT IS SO ORDERED.

REPORT-RECOMMENDATION

GEORGE H. LOWE, United States Magistrate Judge.

This *pro se* prisoner civil rights action, filed pursuant to 42 U.S.C. § 1983, has been referred to me for Report and Recommendation by the Honorable Frederick J. Scullin, Jr., Senior United States District Judge, pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c) of the Local Rules of Practice for this Court. Generally, Jose Rodriguez ("Plaintiff") alleges that, while he was an inmate at Oneida Correctional Facility in 2003 and 2004, ten employees of the New York State Department of Correctional Services ("Defendants") were deliberately indifferent to his serious medical needs, and subjected him to cruel and unusual prison conditions, in violation of the Eighth Amendment. (Dkt. No. 27 [Plf.'s Am. Compl.].) Currently pending is Defendants' motion to dismiss for failure to provide notice to the Court of a change of address, pursuant to Local Rule 41.2(b) of the Local Rules of Practice for this Court. (Dkt. No. 86.) Plaintiff has not opposed the motion, despite having been given more than six weeks in which to do so. Under the circumstances, I recommend that (1) Defendants' motion to dismiss be granted, and (2) in the alternative, the Court exercise its inherent authority to *sua sponte* dismiss Plaintiff's Amended Complaint for failure to prosecute and/or failure to comply with an Order of the Court.

I. DEFENDANTS' MOTION TO DISMISS

Under the Local Rules of Practice for this Court, Plaintiff has effectively "consented" to the granting of Defendants' motion to dismiss, since (1) he failed to oppose the motion, (2) the motion was properly filed, and (3) Defendants have, through the motion, met their burden of demonstrating entitlement to the relief requested in the motion. L.R. 7.1(b)(3).

In particular, with regard to this last factor (i.e., that Defendants have met their burden of demonstrating entitlement to the relief requested), Defendants argue that their motion to dismiss should be granted because (1) Local Rule 41.2(b) provides that "[f]ailure to notify the Court of a change of address in accordance with [Local Rule] 10.1(b) may result in the dismissal of any pending

Not Reported in F.Supp.2d, 2007 WL 4246443 (N.D.N.Y.)

(Cite as: 2007 WL 4246443 (N.D.N.Y.))

action,” (2) on April 15, 2004, Plaintiff was specifically advised of this rule when (through Dkt. No. 5, at 4) the Court advised Plaintiff that “his failure to [promptly notify the Clerk’s Office and all parties or their counsel of any change in his address] will result in the dismissal of his action,” (3) on May 22, 2007, Plaintiff was released from the Willard Drug Treatment Center, (4) since that time, Plaintiff has failed to provide notice to the Court (or Defendants) of his new address, as required by Local Rule 10.1(b)(2), and (5) as a result of this failure, Defendants have been prejudiced in that they have been unable to contact Plaintiff in connection with this litigation (e.g., in order to depose him, as authorized by the Court on May 4, 2007). (Dkt. No. 86, Part 4, at 1-2 [Defs.’ Mem. of Law].)

*2 Authority exists suggesting that an inquiry into the third factor (i.e., whether a movant has met its “burden to demonstrate entitlement” to dismissal under Local Rule 7.1[b][3]) is a more limited endeavor than a review of a contested motion to dismiss.^{FN1} Specifically, under such an analysis, the movant’s burden of persuasion is lightened such that, in order to succeed, his motion need only be “facially meritorious.”^{FN2} Given that Defendants accurately cite the law and facts in their memorandum of law, I find that they have met their lightened burden on their unopposed motion. Moreover, I am confident that I would reach the same conclusion even if their motion were contested.

^{FN1}. See, e.g., *Hernandez v. Nash*, 00-CV-1564, 2003 U.S. Dist. LEXIS 16258, at *7-8, 2003 WL 22143709 (N.D.N.Y. Sept. 10, 2003) (Sharpe, M.J.) (before an unopposed motion to dismiss may be granted under Local Rule 7.1[b][3], “the court must review the motion to determine whether it is *facially meritorious*”) [emphasis added; citations omitted]; *Race Safe Sys. v. Indy Racing League*, 251 F.Supp.2d 1106, 1109-10 (N.D.N.Y.2003) (Munson, J.) (reviewing whether record contradicted defendant’s arguments, and whether record supported plaintiff’s claims, in deciding unopposed motion to dismiss, under Local Rule 7.1[b][3]); see also *Wilmer v. Torian*, 96-CV-1269, 1997 U.S. Dist. LEXIS 16345, at *2 (N.D.N.Y. Aug. 29, 1997) (Hurd, M.J.) (applying prior version of Rule 7.1

[b][3], but recommending dismissal because of plaintiff’s failure to respond to motion to dismiss *and* the reasons set forth in defendants’ motion papers), *adopted by* 1997 U.S. Dist. LEXIS 16340, at *2 (N.D.N.Y. Oct. 14, 1997) (Pooler, J.); *accord*, *Carter v. Superintendent Montello*, 95-CV-0989, 1996 U.S. Dist. LEXIS 15072, at *3 (N.D.N.Y. Aug. 27, 1996) (Hurd, M.J.), *adopted by* 983 F.Supp. 595 (N.D.N.Y.1996) (Pooler, J.).

^{FN2}. See, e.g., *Hernandez*, 2003 U.S. Dist. LEXIS 1625 at *8.

For these reasons, I recommend that the Court grant Defendants’ motion to dismiss.

II. *SUA SPONTE* DISMISSAL

Even if Defendants have not met their burden on their motion to dismiss, the Court possesses the inherent authority to dismiss Plaintiff’s Amended Complaint *sua sponte* under the circumstances. Rule 41 of the Federal Rules of Civil Procedure permits a defendant to move to dismiss a proceeding for (1) failure to prosecute the action and/or (2) failure to comply with the Federal Rules of Civil Procedure or an Order of the Court. Fed.R.Civ.P. 41(b).^{FN3} However, it has long been recognized that, despite Rule 41 (which speaks only of a *motion* to dismiss on the referenced grounds, and not a *sua sponte* order of dismissal on those grounds), courts retain the “inherent power” to *sua sponte* “clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief.” Link v. Wabash R.R. Co., 370 U.S. 626, 630, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); see also Saylor v. Bastedo, 623 F.2d 230, 238 (2d Cir.1980); Theilmann v. Rutland Hospital, Inc., 455 F.2d 853, 855 (2d Cir.1972). Indeed, Local Rule 41.2(a) not only recognizes this authority but *requires* that it be exercised in appropriate circumstances. See N.D.N.Y. L.R. 41.2(a) (“Whenever it appears that the plaintiff has failed to prosecute an action or proceeding diligently, the assigned judge *shall* order it dismissed.”) [emphasis added].

^{FN3}. Fed.R.Civ.P. 41(b) (providing, in pertinent part, that “[f]or failure of the plaintiff to prosecute or to comply with these rules or any

Not Reported in F.Supp.2d, 2007 WL 4246443 (N.D.N.Y.)

(Cite as: 2007 WL 4246443 (N.D.N.Y.))

order of court, a defendant may move for dismissal of an action or of any claim against the defendant”).

A. Failure to Prosecute

With regard to the first ground for dismissal (a failure to prosecute the action), it is within the trial judge's sound discretion to dismiss for want of prosecution.^{FN4} The Second Circuit has identified five factors that it considers when reviewing a district court's order to dismiss an action for failure to prosecute:

^{FN4}. See Merker v. Rice, 649 F.2d 171, 173 (2d Cir.1981).

[1] the duration of the plaintiff's failures, [2] whether plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4] whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard and [5] whether the judge has adequately assessed the efficacy of lesser sanctions.^{FN5}

^{FN5}. See Shannon v. GE Co., 186 F.3d 186, 193 (2d Cir.1999) (affirming Rule 41[b] dismissal of plaintiff's claims by U.S. District Court for Northern District of New York based on plaintiff's failure to prosecute the action) [citation and internal quotation marks omitted].

*3 As a general rule, no single one of these five factors is dispositive.^{FN6} However, I note that, with regard to the first factor, Rule 41.2 of the Local Rules of Practice for this Court provides that a “plaintiff's failure to take action for four (4) months shall be presumptive evidence of lack of prosecution.” N.D.N.Y. L.R. 41.2(a). In addition, I note that a party's failure to keep the Clerk's Office apprised of his or her current address may also constitute grounds for dismissal under Rule 41(b) of the Federal Rules of Civil Procedure.^{FN7}

^{FN6}. See Nita v. Conn. Dep't of Env. Protection, 16 F.3d 482 (2d Cir.1994).

^{FN7}. See, e.g., Robinson v. Middaugh, 95-CV-0836, 1997 U.S. Dist. LEXIS 13929, at *2-3, 1997 WL 567961 (N.D.N.Y. Sept. 11, 1997) (Pooler, J.) (dismissing action under Fed.R.Civ.P. 41[b] where plaintiff failed to inform the Clerk of his change of address despite having been previously ordered by Court to keep the Clerk advised of such a change); see also N.D.N.Y. L.R. 41.2(b) (“Failure to notify the Court of a change of address in accordance with [Local Rule] 10.1(b) may result in the dismissal of any pending action.”).

Here, I find that, under the circumstances, the above-described factors weigh in favor of dismissal. The duration of Plaintiff's failure is some six-and-a-half months, i.e., since April 22, 2007, the date of the last document that Plaintiff attempted to file with the Court (Dkt. No. 85). Plaintiff received adequate notice (e.g., through the Court's above-referenced Order of April 15, 2004, and Defendants' motion to dismiss) that his failure to litigate this action (e.g., through providing a current address) would result in dismissal. Defendants are likely to be prejudiced by further delays in this proceeding, since they have been waiting to take Plaintiff's deposition since May 4, 2007. (Dkt. No. 84.) I find that the need to alleviate congestion on the Court's docket outweighs Plaintiff's right to receive a further chance to be heard in this action.^{FN8} Finally, I have considered all less-drastic sanctions and rejected them, largely because they would be futile under the circumstances (e.g., an Order warning or chastising Plaintiff may very well not reach him, due to his failure to provide a current address).

^{FN8}. It is cases like this one that delay the resolution of other cases, and that contribute to the Second Circuit's dubious distinction as having (among the twelve circuits, including the D.C. Circuit) the longest median time to disposition for prisoner civil rights cases, between 2000 and 2005 (9.8 months, as compared to a national average of 5.7 months). Simply stated, I am unable to afford Plaintiff with further special solicitude without impermissibly burdening the Court and unfairly tipping the scales of justice against Defendant.

Not Reported in F.Supp.2d, 2007 WL 4246443 (N.D.N.Y.)

(Cite as: 2007 WL 4246443 (N.D.N.Y.))

B. Failure to Comply with Order of Court

With regard to the second ground for dismissal (a failure to comply with an Order of the Court), the legal standard governing such a dismissal is very similar to the legal standard governing a dismissal for failure to prosecute. "Dismissal ... for failure to comply with an order of the court is a matter committed to the discretion of the district court." ^{FN9} The correctness of a dismissal for failure to comply with an order of the court is determined in light of five factors:

^{FN9}. Alvarez v. Simmons Market Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir.1988) [citations omitted].

(1) the duration of the plaintiff's failure to comply with the court order, (2) whether plaintiff was on notice that failure to comply would result in dismissal, (3) whether the defendants are likely to be prejudiced by further delay in the proceedings, (4) a balancing of the court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard, and (5) whether the judge has adequately considered a sanction less drastic than dismissal. ^{FN10}

^{FN10}. Lucas v. Miles, 84 F.3d 532, 535 (2d Cir.1996) [citations omitted].

Here, I find that, under the circumstances, the above-described factors weigh in favor of dismissal for the same reasons as described above in Part II.A. of this Report-Recommendation. I note that the Order that Plaintiff has violated is the Court's Order of April 15, 2004, wherein the Court ordered Plaintiff, *inter alia*, to keep the Clerk's Office apprised of his current address. (Dkt. No. 5, at 4.) Specifically, the Court advised plaintiff that "*[p]laintiff is also required to promptly notify the Clerk's Office and all parties or their counsel of any change in plaintiff's address; his failure to do same will result in the dismissal of this action.*" (*Id.*) I note also that, on numerous previous occasions in this action, Plaintiff violated this Order, resulting in delays in the action. (See Dkt. Nos. 47, 48, 49, 50, 54, 59, 72, 78, 79 & Dkt. Entry for 12/15/06 [indicating that mail from the Court to Plaintiff was returned as undeliverable].)

*4 As a result, I recommend that, should the Court decide to deny Defendants' motion to dismiss, the Court exercise its authority to dismiss Plaintiff's Amended Complaint *sua sponte* for failure to prosecute and/or failure to comply with an Order of the Court.

ACCORDINGLY, for the reasons stated above, it is

RECOMMENDED that Defendants' motion to dismiss (Dkt. No. 86) be **GRANTED**; and it is further

RECOMMENDED that, in the alternative, the Court exercise its inherent authority to **SUA SPONTE DISMISS** Plaintiff's Amended Complaint for failure to prosecute and/or failure to comply with an Order of the Court.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have ten (10) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN (10) DAYS WILL PRECLUDE APPELLATE REVIEW.** Roldan v. Racette, 984 F.2d 85, 89 (2d Cir.1993) (citing Small v. Sec'y of Health and Human Servs., 892 F.2d 15 [2d Cir.1989]); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e)..

N.D.N.Y.,2007.

Rodriguez v. Goord

Not Reported in F.Supp.2d, 2007 WL 4246443 (N.D.N.Y.)

END OF DOCUMENT

Not Reported in F.Supp., 1994 WL 23069 (S.D.N.Y.)
(Cite as: 1994 WL 23069 (S.D.N.Y.))

H

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
Dale HENDRICKSON, Plaintiff,

v.

UNITED STATES ATTORNEY GENERAL, G.L.
Hershberger, United States Bureau of Prisons, Gary
Morgan, Pamela Ashline, Kenneth Walicki, Hulet
Keith, Otisville Medical Department, Defendants.

No. 91 CIV. 8135.
Jan. 24, 1994.

MEMORANDUM AND ORDER

McKENNA, District Judge.

*1 On December 4, 1991, pro se plaintiff Dale Hendrickson ("Plaintiff" or "Hendrickson"), an inmate then in confinement at the Federal Correctional Institution in Otisville, New York ("Otisville"), filed this action for injunctive relief and damages based upon alleged violations of his rights under the United States Constitution, Amendments I, IV, V, VI, IX, and XIII, and upon violations of various laws and/or regulations governing prison administration.^{FNI} The Complaint named as defendants G.L. Hershberger ("Hershberger"), the United States Attorney General ("Attorney General"), Gary Morgan ("Morgan"), Pamela Ashline ("Ashline"), Kenneth Walicki ("Walicki"), Hulett Keith ("Keith"), the Bureau of Prisons ("BOP"), and the Otisville Medical Department ("OTV Medical Department") (collectively "Defendants"). Defendants moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set out below, Defendants' Rule 12(c) motion is granted.

I.

Defendants move to dismiss Plaintiff's Complaint, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for failure to state a claim upon

which relief can be granted. Rule 12(c) provides:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed.R.Civ.P. 12(c). "[T]he same standards that are employed for dismissing a complaint for failure to state a claim under Fed.R.Civ.P. 12(b)(6) are applicable" to a Rule 12(c) motion to dismiss for failure to state a claim upon which relief can be granted. See *Ad-Hoc Comm. of the Baruch Black & Hispanic Alumni Ass'n v. Bernard M. Baruch College*, 835 F.2d 980, 982 (2d Cir.1987); see also *Viacom Int'l. Inc. v. Time, Inc.*, 785 F.Supp. 371, 375 n. 11 (S.D.N.Y.1992); 5A Charles Wright and Arthur R. Miller, *Federal Practice and Procedure* ¶ 1367, at 515-16 (1990). Thus, the Court must read the Complaint generously, drawing all reasonable inferences from the complainant's allegations. See *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972). Moreover, "consideration is limited to the factual allegations in [the] amended complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiff[s] possession or of which plaintiff[] had knowledge and relied on in bringing suit." *Brass v. American Film Technologies, Inc.*, 987 F.2d 142 (2d Cir.1993); accord *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir.1991); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir.1991), cert. denied, 112 S.Ct. 1561 (1992); *Frazier v. General Elec. Co.*, 930 F.2d 1004, 1007 (2d Cir.1991). Defendants, therefore, are entitled to dismissal for failure to

Not Reported in F.Supp., 1994 WL 23069 (S.D.N.Y.)
(Cite as: 1994 WL 23069 (S.D.N.Y.))

state a claim only if the Court finds beyond a doubt that “plaintiff can prove no set of facts” to support the claim that plaintiff is entitled to relief. See *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

*2 Because the 3(g) statement and declarations submitted to this Court by Defendants have not been considered and are hereby excluded from the record, the Court renders its judgment on the pleadings pursuant to Rule 12(c).

II.

Drawing all inferences in favor of the Plaintiff, *Miller v. Polar Molecular Corp.*, 12 F.3d 1170, 1993 WL 527434 (2d Cir.), the facts are as follows.

During Hendrickson's confinement at Otisville, certain video tapes which had been supplied to him by the government were “systematically and maliciously confiscated”; audio tapes and legal materials also were removed from Plaintiff's possession while he was a pre-trial detainee at Otisville. In retaliation for his bringing legal materials into the Otisville compound area, Plaintiff claims, he was placed in administrative detention. Compl. at 1 (presumably ¶ A.)

Hendrickson also claims at various times to have been wrongly isolated from the general prison population based on alleged and allegedly erroneous OTV Medical Department claims that he had tuberculosis. *Id.* ¶ B. During these periods of medical confinement, Hendrickson claims that the “4A unit team” denied him personal visits, his right to send mail, and telephone communications and consultations necessary to his legal representation. *Id.* ¶ C.

Hendrickson claims that as part of his medical confinement he was “subjected to ruthless and inhumane [d]isciplinary action from the D[isciplinary] H[earing] O[fficer],” and was for 15 days placed in administrative detention and for 30 days deprived of commissary, visitation, and phone privileges. *Id.* ¶ D.

Hendrickson further alleges that commissary items that he had in his possession before entering medical confinement were wrongly confiscated from him, and while in such confinement he was assaulted and searched by the “OTV Riot Squad.” *Id.* ¶ E. In addition, he claims, commissary receipts, as well as legal documents and other legal materials were confiscated from him. *Id.* ¶ F.

III.

Defendants argue that Plaintiff fails to state a claim for which relief may be granted. Of course, in considering a pro se pleading, the Court takes into consideration the special circumstances of pro se litigants. As the Second Circuit has often noted, “special solicitude should be afforded pro se litigants generally, when confronted with motions for summary judgment.” *Graham v. Lewinski*, 848 F.2d 342, 344 (2d Cir.1988); accord, e.g., *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir.1988); *Beacon Enters., Inc. v. Menzies*, 715 F.2d 757, 767 (2d Cir.1983). We apply the same solicitous standard to the instant motion to dismiss.

Plaintiff, however, has failed to present to this Court either a colorable theory of violation of legal duties or facts to support a claim that might be inferred from the pleadings. Even assuming the truth of Plaintiff's allegations, the Court is left without a cognizable claim before it.

*3 At the outset, the Court notes that to the extent that the Complaint seeks injunctive relief from conditions of Plaintiff's treatment while at Otisville as a pre-trial detainee, the claim is now moot as Plaintiff has since been transferred to the United States Penitentiary in Lompoc, California following his conviction at trial. Hendrickson's Complaint also fails to the extent that it seeks damages from the United States government or government officials in their official capacity. Because the United States government enjoys sovereign immunity, it can be sued only to the extent it so consents. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941)). No such immunity has been waived in

Not Reported in F.Supp., 1994 WL 23069 (S.D.N.Y.)
(Cite as: 1994 WL 23069 (S.D.N.Y.))

suits for damages arising from constitutional violations. *Keene Corp. v. United States*, 700 F.2d 836, 845 n. 13 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983). Thus, the only possible redress remaining available to Plaintiff for the harms alleged is a *Bivens* action ^{FN2} against government officials in their personal capacities for actions taken under the color of governmental authority.

As Defendants point out, however, Plaintiff has nowhere, other than in the caption of the Complaint, mentioned by name any of the individual named Defendants. Defs.' Mem.Supp.Mot.Dismiss or Summ.Jt. at 2. It is true that Plaintiff did in the body of the Complaint name the "4A Unit Team," the "DHO," and the "OTV Riot Squad," but these designations of group actions undifferentiated as to individuals and of official titles unconnected to any individual names do not allege the actionable *individual* behavior necessary to sustain a *Bivens* claim.

In a *Bivens* action, where Defendants are sued in their personal capacities, actionable behavior must be alleged as to individuals. *See, e.g., Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir.1977); *Barbera v. Smith*, 836 F.2d 96, 99 (2d Cir.1987), *cert. denied*, 489 U.S. 1065 (1989). A complaint that fails to make any specific factual allegations of "direct and personal responsibility on the part of any of the named defendants in regard to the loss of any of [plaintiff's] property" must be dismissed. *Lee v. Carlson*, 645 F.Supp. 1430, 1436 (S.D.N.Y.1986).

More importantly, the light in which a pro se complaint may be considered does not burn so brightly as to blind the court as to the rights of defendants who are entitled to have claims against them alleged with sufficient clarity as to make possible a defense. Even in a pro se complaint, claims must "specify in detail the factual basis necessary to enable [defendants] intelligently to prepare their defense ..." *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir.1977). Otherwise, blameless parties would be subject to damages claims for free-floating innuendo. To be sufficient before the law, a complaint

must state precisely who did what and how such behavior is actionable under law. Although the Court may make special efforts to understand the underlying claim of a vague, confusing, or poorly crafted pro se complaint that it would not undertake in connection with a claim prepared by legal counsel, it cannot do so to the extent that this would work an injustice to defendants, whose rights also must be protected. A defendant who is alleged to be liable for his actions has a right to have the claims against him spelled out with a basic degree of clarity and particularity. *See supra* at 7. Although some of the harms alleged by Plaintiff might conceivably be of some substance, the Court cannot understand from the documents before it which defendants are alleged to have participated in which allegedly actionable behavior. The Court cannot on such a basis subject a party to potential liability. *See* Defs' Mot. at 9, 10.

Summary and Order

*4 For the reasons stated, Plaintiff has failed to plead a colorable case. Defendants' motion to dismiss is granted.

FN1. The Complaint states only that "Bureau of Prison institutional Law" was violated; subsequent documents filed by Plaintiff imply the violation of specific prison policies. *See, e.g.,* Letter from Hendrickson to Judge McKenna of 10/13/93 at 2 (citing BOP Policy Statement 1315.3 purportedly concerning prisoner access to legal materials while in administrative detention).

FN2. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

S.D.N.Y.,1994.

Hendrickson v. U.S. Atty. Gen.

Not Reported in F.Supp., 1994 WL 23069 (S.D.N.Y.)

Not Reported in F.Supp., 1994 WL 23069 (S.D.N.Y.)
(Cite as: **1994 WL 23069 (S.D.N.Y.)**)

END OF DOCUMENT